

**BEFORE THE
EDUCATION AUDIT APPEALS PANEL
STATE OF CALIFORNIA**

In the Matter of:

VALLEJO CITY UNIFIED
SCHOOL DISTRICT,

Re: Appeal of Audit Findings 05-56, 05-66,
and 05-67, Fiscal Year 2004-05,

Appellant.

Case No. 06-15

OAH No. 2006080727

On December 17, 2007, the Office of Administrative Hearings (OAH) issued a Proposed Decision in this matter. On March 17, 2008, the Education Audit Appeals Panel (EAAP) rejected the Proposed Decision, and invited written argument by April 14, 2008, particularly with regard to the application of the law to the facts of each finding: Finding 05-56, Education Code Section 51747 and California Code of Regulations, Title 5, Section 11700(d); Finding 05-66, Education Code Section 48663; and Finding 05-67, former Education Code Section 44579.1 and California Code of Regulations, Title 5, Section 6001. No arguments were filed.

FINDINGS AND CONCLUSIONS

1. The Division of Audits of the State Controller's Office (SCO) conducted an audit of the Vallejo City Unified School District (District) for Fiscal Year 2004-05. In June 2006, SCO issued its audit report, which included numerous audit findings.

2. The District appealed Audit Findings 05-56, 05-62, 05-63, 05-66, and 05-67, pursuant to Education Code Section 41344(d),¹ which provides that the District may present evidence or arguments that an audit finding was based on errors of fact or interpretation of law.

3. The administrative adjudication provisions of the Administrative Procedure Act (APA, Gov. Code, §§ 11400 et seq. and 11500 et seq.) apply to this proceeding. The District has the burden of proof (§ 41344(d); *In the Matter of the Statement of Issues Against: Fresno County Office of Education*, (2001) EAAP Case No. 00-03; OAH Case No. N2000050273, p. 8.²)

¹ Unless otherwise specified, all statutory citations are to the Education Code as applicable to the 2004-05 school year.

² "Education Code section 41344(d) specifically provides that the party that appeals the audit 'present evidence or arguments.' That provision places the burden of proof on FCOE as appellant in the subject case."

4. A hearing was held over three days: June 11, 12, and 15, 2007.³ The parties stipulated that Audit Finding 05-62 does not warrant the imposition of a penalty, and hence that audit finding is not at issue. At the time of the hearing, the District withdrew its appeal of Audit Finding 05-63. Audit Findings 05-56, 05-66, and 05-67 remain at issue.

AUDIT FINDING 05-56: INDEPENDENT STUDY AGREEMENTS

5. Audit Finding 05-56 set forth two major areas of noncompliance in the District's independent study agreements. The first of these resulted in disallowance of all 236.49 units of the District's full-time independent study Average Daily Attendance (ADA), for which the auditors calculated \$1,145,825 was apportioned. The second would have separately resulted in disallowance of all 166.77 ADA from the District's Home Outreach Program of Education (HOPE), a calculated apportionment of \$808,022, which is included within the larger disallowance.⁴

6. Audit Finding 05-56 stated the following deficiency in all of the District's independent study agreements:

The agreement for students on full-time independent study did not specify the number of homework assignments that can be missed before an evaluation is performed (Education Code Section 51747(b)).

The finding quoted Section 51747, which provides, in pertinent part, that a school district is not eligible to receive apportionments

for independent study by pupils ... unless it has adopted written policies, and has implemented those policies, pursuant to rules and regulations adopted by the Superintendent of Public Instruction, that include, but are not limited to, all of the following:

(b) The number of missed assignments that will be allowed before an evaluation is conducted to determine whether it is in the best interests of the pupil to remain in independent study or whether he or she should return to the regular school program.

...

(c) A requirement that a current written agreement for each independent study pupil shall be maintained on file including, but not limited to, all of the following:

...

³ References to the Reporter's Transcript of the administrative hearing are noted as "RT," followed by the volume, page, and line numbers.

⁴ State's Ex. 56, p. IS 004.

4. A statement of the policies adopted pursuant to [subdivision] ... (b) regarding ... the number of missed assignments allowed prior to an evaluation of whether or not the pupil should be allowed to continue in independent study.

The purpose of the written agreement as specified is ‘notice’ – that is, to ensure that students, parents, and teachers are aware of the statutory requirements for independent study programs. (*Modesto City Schools v. Education Audit Appeals Panel* (2004) 123 Cal.App.4th 1365, 1377.) Every independent study contract must include all of the specific elements required by Section 51747. (*Id.*)

7. The District's Master Agreement for Independent Study included a provision whereby the pupil agreed to:

Meet weekly with my assigned teacher. I understand that failure to complete *my assignments* will result in an evaluation to determine if I can remain in Independent Study. [Emphasis added.]

8. Section 51747 requires that school district policy specify a number of missed assignments that will trigger an evaluation of whether the pupil should continue in independent study, and requires that number to be stated in the independent study agreement. The District's use of “my assignments” in its agreements, in lieu of a number, was not in compliance with the requirement in Section 51747.

9. The District argues that it substantially complied with the provisions of Section 51747. Section 41344.1(c) defines “substantial compliance” as follows:

[N]early complete satisfaction of all material requirements of a funding program that provide an educational benefit substantially consistent with the program's purpose. A minor or inadvertent noncompliance may be grounds for a finding of substantial compliance provided that the local educational agency can demonstrate that it acted in good faith to comply with the conditions established in law or regulation necessary for apportionment of funding.

10. Dr. Susan Craig is the District's Coordinator of Student Support Services. In the 2004-05 school year, Dr. Craig served as the principal of HOPE School and as the Interim Coordinator of Student Welfare and Attendance. Asked what happened when a student failed to complete an assignment, Dr. Craig testified as follows:

If they fail to complete an assignment one week, then the teacher would talk to the student about that, remind them of the importance to do their work each week. ... So, they were given

support and opportunities, but if there was a repeated pattern, whereby the student wasn't doing work or wasn't showing up, and the teacher's attempts to contact the parent and the student were not successful, then we would have to look at sending the student back to a comprehensive setting.⁵

11. The District operated one other independent study program.⁶ Latyna Young, the principal at People's High School during the 2004-05 school year, testified as follows:

If that type of situation continues and we don't get satisfactory results from that first one and we have to continue it, after the third time of evaluation, we have a conference with the parent and the teacher and tell them that since this is a voluntary program and they have opted to come in this program, it doesn't seem to be working, so we're going to put them back into a comprehensive high school.⁷

12. Neither of the patterns of practice testified to constitutes "nearly complete satisfaction" of the requirement that pupils entering upon independent study be given clear, prior notice of the specific number of missed assignments that will trigger an evaluation of the appropriateness of the pupil's placement in independent study.

Further, the District's noncompliance cannot be adjudged inadvertent. The District presented no testimony or other evidence of 'good faith action' on its part to include a compliant provision in its written agreements, let alone any showing of unrelated circumstances that defeated the effect of such an action. To the contrary, rather than, say, inadvertently omitting altogether any provision regarding an evaluation of whether a pupil should remain in independent study based on missed assignments, the record shows that the District did include an evaluation-of-continued-placement provision – but one that contained a phrase that avoided stating either the missed assignments number in the district's adopted policy, or indeed any specific number at all.

Hence, the District did not demonstrate that it met either of the criteria set forth in Section 41344.1(c) for a finding of substantial compliance with regard to the missed assignments provision of its independent study agreement.

13. The second area of noncompliance identified in the District's independent study program was set forth in Audit Finding 05-56 as follows:

The master agreement used by the Hope Outreach program states that the pupil has to stay in the independent study

⁵ RT III, 150:10-13, 151:2-7.

⁶ RT III, 141:17-18.

⁷ RT III, 166:16-23.

program until the end of the current semester. This statement contravenes the voluntary participation requirement stipulated in Section 51747(c)(7).

Section 51747(c)(7) was also quoted in the finding:

7. The inclusion of a statement in each independent study agreement that independent study is an optional educational alternative in which no pupil may be required to participate....

14. Pupils in the District's HOPE independent study program (and their parents or guardians) signed two documents, each titled "Master Agreement," on the same day.⁸ The "MASTER AGREEMENT FOR THE H.O.P.E. PROGRAM" included the following language:

I [the pupil] Understand that:

- Independent study is an optional educational alternative that I have voluntarily selected.

The "HOPE School Independent Study Master Agreement 2004-2005 School Year" included the following paragraph:

The HOPE Master Agreement is valid for the duration of the current semester. If a parent/guardian wishes to transfer to [sic] student back to a traditional school setting in the VCUSD, *the student is expected to do so at the end of the current semester.* If, at any time, it is the judgment of either the parent/guardian, the HOPE teacher, or the HOPE principal that the student is not making significant academic progress in the HOPE program, the HOPE principal will conduct an evaluation to determine whether it is in the student's best interest to remain in HOPE. Academic achievement, attendance, and participation in standardized testing will be taken into consideration. [Emphasis added.]

15. The first HOPE independent study "Master Agreement," quoted above, contained all but one of the statutory requirements for written agreements (as noted above), including, in particular, the statement "Independent study is an optional educational alternative." The second "Master Agreement" quoted above was actually more in the nature of a statement of HOPE school policies, and for that reason did not vitiate the legal effectiveness of the first, true "master agreement."

⁸ RT III, 140:3-8.

16. Audit Finding 05-56 identified three additional areas of noncompliance: seven independent study agreements were signed after the students had commenced independent study (1.0 ADA, \$4,845);⁹ the file for one student was not provided (.05 ADA, \$242);¹⁰ and files for four students lacked requisite documentation (.24 ADA, \$1,163).¹¹ These amounts are included in the total disallowance stated above. The parties did not contest or brief these issues.

17. The District did not establish that the first part of Audit Finding 05-56 was based on errors of fact or law, or that the District was in substantial compliance with the requirement to include a statement of the district policy as to the number of missed assignments that would trigger a placement evaluation. The second part of the finding was a misapplication of the law to the facts. (§§ 41344(d), 41344.1(c).) The District is accordingly required to return state funding attributable to the ADA disallowed by the first part of this audit finding.

AUDIT FINDING 05-66: COMMUNITY DAY SCHOOL ATTENDANCE

18. Audit Finding 05-66 quoted the statutory requirements for funding for the Community Day School program:

(a) The minimum school day in a community day school is 360 minutes of classroom instruction provided by a certificated employee of the district reporting the attendance of the pupils for apportionment funding.

...

(c) For purposes of calculating the additional funding provided to a school district pursuant to Section 48664, only[,] community day school attendance shall be reported in clock hours. Attendance of less than five clock hours in a school day shall be disregarded for purposes of Section 48664. Five clock hours of attendance in one school day shall be deemed to be one-half day of attendance, for purposes of additional funding pursuant to Section 48446. Six clock hours or more of attendance in one school day shall be deemed to be one day of attendance, for purposes of additional funding pursuant to Section 48664. (§ 48663.)¹²

⁹ State's Ex. 56, IS 003.

¹⁰ State's Ex. 56, IS 006.

¹¹ State's Ex. 56, IS 008.

¹² The audit report included three apparent typographical errors in quoting this statute: it labeled this subdivision (b) instead of (c), and showed one of the four references to Section 48664 in this subdivision as "48446" and another as "48406." As the Education Code is readily available for reference, and contains no sections 48446 or 48406, these errors are harmless.

The audit finding also quoted, in pertinent part, California Code of Regulations, Title 5, Section 402:¹³

For apportionment purposes, attendance of a pupil upon schools or classes maintained by a school district or a county superintendent may be counted when the pupil is present during the time lawfully prescribed for the school or class in which he is enrolled and when such attendance meets the requirements prescribed by Section 46300....

The audit finding stated:

In reviewing the community day school attendance, we determined that hourly attendance was not taken for the 7th and 8th grade [sic]; thus, all ADA claimed for these grades is disallowed.

The finding disallowed additional funding calculated by the auditors to be \$62,888, for 13.24 ADA for the 5th hour and 13.22 ADA for the 6th hour of attendance reported for pupils in grades 7 and 8.¹⁴

19. The District argues that the audit finding penalizes the district “for failure to comply with criteria fabricated by the SCO Audit.” The District argues that Section 48663 does not require attendance to be taken hourly and does not purport to instruct districts or teachers how or when to take attendance in the classroom. Instead, Section 48663(c) requires community day school attendance to be “reported in clock hours” “[f]or purposes of calculating the additional funding provided to a school district.”

20. It is axiomatic that attendance cannot be reported in clock hours if it has not been determined in clock hours. Therefore, the source documents (teacher attendance registers) must clearly evidenciate attendance by clock hour. The recorded attendance then must be accurately summarized and reported for funding.

21. The record shows that the District had one teacher for the 7th and 8th grade Community Day School pupils, in a self-contained classroom.¹⁵ The form for recording attendance used by that teacher listed pupils by name and, as testified by that teacher, she recorded attendance by indicating “P” for present, “Ab” for absent, and “Susp” for suspended for full days, with notations of times for pupils who came late or left early.¹⁶ The District's un rebutted evidence, along with the attendance forms in the record, thereby

¹³ The report identified this quotation as Section 401 instead of Section 402, also harmless error.

¹⁴ The audit finding included separately calculated ADA-based funding disallowances for each of the P-2 (second principal) and Annual apportionments. Funding adjustments for Community Day Schools, however, are properly calculated on the basis of Annual ADA, only. (§ 48664.)

¹⁵ RT III, 71:10-12.

¹⁶ RT III, 77:14 to 78:1.

demonstrated that community day school attendance was determined and recorded in a manner that enabled compliance with the provisions of Section 48663.

22. Audit Finding 05-66 was evidently based, in part, on an error of fact: The teacher's attendance monitoring and recording practices, contrary to the finding, were adequate to substantiate attendance by clock hour in the 7th and 8th grades. The District is not required to return state funding related to this part of the finding.¹⁷

23. Audit Finding 05-66 identified three other areas of noncompliance in high school community day attendance: claims not supported by source documentation (teachers' attendance registers, 0.29 ADA; \$1,405), pupils inappropriately reported for additional funding (0.26 for the 5th hour and 0.32 for the 6th hour, \$1,373), and attendance for a pupil who was not scheduled for the required 360 minutes of instructional time per day (0.46 base ADA and 0.46 ADA for the 6th hour of attendance, \$3,327). These items were not contested by the District; the District is required to return the state funding associated with them.

AUDIT FINDING 05-67: INSTRUCTIONAL TIME AND STAFF DEVELOPMENT REFORM PROGRAM

24. Audit Finding 05-67 quoted Section 44579.1, subdivisions (c) and (e):

(c) Each fiscal year, the Superintendent of Public Instruction shall provide each eligible school district ... applying for a grant pursuant to this article with a staff development allowance ..., for up to three days, for each certificated classroom teacher, and ..., for up to one day for each classified classroom instructional aide and certificated teaching assistant who participates in staff development instructional methods, including teaching strategies, classroom management and other training designed to improve pupil performance, conflict resolution, intolerance and hatred prevention, and academic content in the core curriculum areas that are provided by the school district

...

(e) To qualify as a funded participant, each eligible participant shall be present for the full staff development day, and records of attendance shall be maintained in a manner to be prescribed in regulations. Each staff development day shall be at least as long as the full-time instructional workday for certificated or classified instructional employees of the school district.

¹⁷ The material in the record from the two months that were sampled in the audit shows, however, that the District's ADA calculations for the 5th and 6th hours of attendance of pupils in grades 7 and 8 do not reconcile to the source documents consistent with the provisions of Section 48663. Compare State's Ex. 66, pages CDS-0033 through 0036 to CDS-0030 through 0032; and compare Appellant's Ex. U, pages 018, 019, and 020 and State's Ex. 66, page CDS-0047 to CDS-0041 through CDS-0046.

The finding also quoted Section 6001, Title 5, California Code of Regulations:

“Records of attendance” as used in Education Code 44579.1(e) shall include a certification by a school district official that the contemporaneous record of attendance correctly represents the full days of attendance claimed for each of the participants claimed in Section 6002.

Each school district, charter school and county office of education participating in the Instructional Time and Staff Development Reform Program shall maintain a certification of the contemporaneous record of attendance of the eligible participants who attended each full staff development day for which the school district, charter school and county office of education requests grant funding pursuant to Education Code sections 44579-44579.4. If a single staff development day is conducted over several calendar days, the contemporaneous records must evidence that each eligible school district, charter school or county office of education employee who participated in the staff development day was present for the equivalent of a full-time instructional work day.

25. Audit Finding 05-67 identified noncompliance with these requirements as follows:

In reviewing the district’s instructional time and staff development reform program (ITSDR), the following deficiencies were noted.

- Agendas, compliant with the staff development requirements, were not provided for 40 of 78 staff development sessions. Hence, we could not determine whether the days claimed were as long as the full-time instructional day, nor could we verify that the content of the session met regulation guidelines.
- Sign-in sheets for one school did not contain the start and end times for two sessions. We were unable to determine whether the session equaled the full-time instructional day.
- No sign-in sheets were provided for three schools and five staff development sessions.
- Fifteen participants at schools with compliant agendas either did not sign out, did not indicate the sign-out time, left early, or came in late.

Based on the above findings, 969 staff development days were disallowed, for a overpayment calculated by the auditors to be \$296,998.

26. The applicable law required that, to be eligible for funding, the staff development days had to meet specified content, length, and attendance requirements. Although the statute and regulation did not specify agendas and sign-in sheets, it is again axiomatic that auditable records must be maintained and that the most common and probative types of records in this instance are agendas and sign-in sheets.

27. The State Administrator of the District testified that the instructional day in the District is 6.5 hours, excluding lunch; that the best way to evidence the length of the training is to use sign-in/sign-out sheets with each person noting his or her arrival and leaving times, including the lunch break; and that an agenda or other document, indicating time slots, could describe the course content.¹⁸ Daly Jordan-Koch, chair of the committee that approved the proposed staff development training for the District, also testified the agenda should have time notations to ensure 6.5 hours of actual training, excluding lunch.¹⁹

28. The District asserted that all of the disallowed staff development days were in either full or substantial compliance with the requirements of the ITSDR statutes. The documentation in the record, however, shows that substantial amounts of time in each of the staff development days were spent on activities and topics that do not qualify as staff development as set forth in the statute – activities such as breakfast, welcoming remarks and “ice breakers” addressing the start of a new school year; doing actual lesson planning for the start of the year, calling families and meeting with pupils for independent study orientation; and topics such as operational matters (budget review, reviewing faculty handbooks, school safety rules, teacher duties outside the classroom, school policies and procedures, “what it means to be taken over by the state,” the Fiscal Crisis and Management Assistance Team (FCMAT), and the like). Time was also spent inappropriately on these days on “developing as a professional educator.”²⁰ When these activities and topics are discounted, none of the disallowed days was “as long as the full-time instructional workday.” (§ 44579.1(e).)²¹

¹⁸ RT III, 62:9 to 63:10, 63:19 to 65:21.

¹⁹ RT II, 21:4-6, 33:2-11, 41:2-17.

²⁰ Such training related to the California Standards for the Teaching Profession (CSTP), Standard 6, but not to any part of the topics set forth in Section 44579.1(c). Daly Jordan-Koch testified that the District used the CSTP standards to develop its ITSDR training, and not the law itself. (RT II, 35:8 to 38:7.) The other five CSTP standards do overlap with the topics in the statute.

²¹ Although counsel for Respondent SCO found the additional documentation related to a two-day retreat by Vallejo High School staff substantiated that the days qualified for funding, the record does not support that proposition. (Respondent’s Opposition to Appellant’s Appeal, page 18, Appendix 1, 3.) Appellant’s Ex. G does not evidence 6.5 hours of qualifying training each day, nor is it possible to determine from the documents what portion of the days was spent on lunch and on ineligible topics (such as operational matters, building school culture among teachers as co-workers [see RT II, 94:6-18, 97:18 to 98:4], and professional development unrelated to classroom instructional methods), on the one hand, and what portion was devoted to training as specified in the statute, on the other – so that it is not possible to aggregate partial days to one qualifying day.

29. The record demonstrates that Audit Finding 05-67 is not based on errors of fact or law and that the District was not in substantial compliance with ITSDR program requirements. The District is required to return the state funding it received for the disallowed staff development days.

ORDER

1. The District's appeal of Audit Finding 05-56 is sustained in part and denied in part.
2. The District's appeal of Audit Finding 05-66 is sustained in part and denied in part.
3. The District's appeal of Audit Finding 05-67 is denied.
4. The District is required to return state funding it received for claims disallowed by Audit Findings 05-56, 05-66, and 05-67.

This Decision shall become effective on May 20, 2008.

Date: May 20, 2008

Original Signed

Diana L. Ducay, Chairperson
for Education Audit Appeals Panel